IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

TUESDAY, THE 11TH SEPTEMBER 2007 / 20TH BHADRA 1929

OP.No. 26673 of 1999(A)

PETITIONER:

BABU KURIAKOSE,
S/O.KURIAKOSE,
PALLATHUKUDIYIL HOUSE,
ADIMALY.

BY ADV. SRI.THAMPAN THOMAS

RESPONDENTS:
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1. **STATE OF KERALA REPRESENTED BY ITS SECRETARY TO DEPARTMENT OF FOREST, SECRETARIATE, TRIVANDRUM.**

2. **THE CHIEF CONSERVATOROF FOREST, TRIVANDRUM.**

3. **THE RANGE OFFICER, FOREST DEPARTMENT, ADIMALY.**

4. **THE DIVISIONAL FOREST OFFICER, DEVIKULAM.**

BY GOVERNMENT PLEADER SRI.RENJITH

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 11/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP NO. 26673/1999

ORDER IN CMP NO.45027 OF 1999 IN OP NO.26673 OF 1999

DISMISSED

11/9/07 **SD/- ANTONY DOMINIC, JUDGE.**

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1: TRUE COPY OF THE REPRESENTATION DATED 20.6.1989 SUBMITTED BY THE PETITIONER TO THE 4TH RESPONDENT.

EXT.P2: TRUE COPY OF THE ORDER NO.M2.387/87 DATED 1.4.1992 ISSUED BY THE 4TH RESPONDENT TO THE PETITIONER.

EXT.P3: TRUE COPY OF THE ORDER NO.M3 387/88 DATED 3.2.1990 ISSUED BY THE 4TH RESPONDENT TO THE PETITIONER.

EXT.P4: TRUE COPY OF THE JUDGMENT DATED 24.3.1998 INOP NO.9142/1992-L PASSED BY THE HIGH COURT OF KERALA, ERNAKULAM.

EXT.P5: TRUE COPY OF THE REPRESENTATION DATED 19.8.1998 SUBMITTED BY THE PETITIONER TO THE 4TH RESPONDENT.

EXT.P6: TRUE COPY OF THE ORDER NO.M4-387/87 DATED 8.9.1999 ISSUED BY THE 4TH RESPONDENT TO THE PETITIONER.

EXHIBITS OF R4

EXT.R4(a): TRUE PHOTOCOPY OF THE SALE NOTIFICATION PUBLISHED IN DEEPIKA MALAYAM DAILY DATED 6.8.1988. (SALE NOTIFICATION NO.M3.387/87 DATED 18.7.1988).

EXT.R4(b): A TRUE PHOTOCOPY OF THE DETAILED SALE CONDITIONS PUBLISHED IN KERALA GAZETTE DATE 2.12.1987 PAGES 403 TO 406.

//TRUE COPY//

ANTONY DOMINIC, J.
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O.P NO. 26673 OF 1999
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Dated this the 11th day of September, 2007

J U D G M E N T

The prayer in this writ petition is to quash Ext.P6 order passed by the respondents and to direct that the deposit of Rs.20,000/- made by the petitioner be returned to him or to require the respondents to deliver 548.8 metric tons of firewood on payment of the auction amount.

2. On 7/9/88, the respondents have conducted an auction of firewood, having a quantity of 548.8 metric tons and the petitioner was the successful bidder. According to him, he had paid Rs.20,000/- and the department was to confirm the auction in his favour. The confirmation of the auction in his favour was conveyed to the petitioner only on 26/12/88. Petitioner submits that confirmation ought to have been made within one month from the date of auction and that by delaying the same, the respondents have

violated the terms and conditions of the sale. It is submitted that after confirmation of sale, when he went for taking delivery of the firewood, it was found that the quantity available was much less than what was tendered. According to him, the Panchayat had also blocked the road through which the material had to be transported. Despite inaccessibility of the place, the petitioner represented to the respondents for delivering the quantity sold in his favour. It is also submitted that there was failure on the part of the respondents, which made the petitioner approach this court on two occasions and Ext.P4 is the judgment that was rendered by this Court in the second original petition. In that original petition, this Court had directed the respondents to reconsider the claim of the petitioner and pass fresh orders thereon. Accordingly, the petitioner was given an opportunity of hearing and thereafter Ext.P6 order was passed. In Ext.P6 order, it has been found that the

Government sustained loss of Rs.1,25,049/- plus advertisement charges and therefore the request of the petitioner for refunding the deposit made by him of Rs.20,000/- was turned down. It is submitted that following Ext.P6, revenue recovery action was proposed to be initiated for recovery of the alleged loss and that made the petitioner file this original petition. The prayer in this writ petition is to quash Ext.P6 order passed by the respondents and to direct that the deposit of Rs.20,000/- made by the petitioner be returned to him or to require the respondents to deliver 548.8 metric tons of firewood on payment of the auction amount.

3. Counter affidavit has been filed on behalf of the respondents contending that in terms of the conditions of sale, if the auction purchaser committed default, re-auction is to be held at the risk and loss of the auction purchaser. According to the respondents, in this case, on account of the

default committed by the petitioner, re-auction had to be conducted and in that process the Government suffered a loss, which has been quantified at Rs.1,25,049/-.

4. Respondents would contend that in terms of the agreement, the loss sustained by the Government is liable to be recovered from the petitioner and that they are entitled to quantify the same. It is their contention that once it is quantified and payment demanded, if there is failure on the part of the petitioner to pay the amount, revenue recovery action is liable to be initiated.

5. The main submission made by the counsel for the petitioner is that the respondents cannot unilaterally quantify the loss alleged to have been suffered by them. He would submit that if the loss is to be quantified in a case where breach of contract is not admitted, they have to approach the Civil Court and only on the strength of a decree of a Competent Civil Court can the respondents seek

to realise the amount. Counsel, also submit that there has been failure on the part of the respondents to deliver the firewood sold and it was on account of the breach of contract committed by the respondents that he could not take delivery of the fire wood. Thus, according to him, this is not a case where breach is admitted by the petitioner and in which event, no unilateral quantification is permissible.

6. From the facts as narrated above, it is evident that the petitioner is contenting for the position that it was on account of the breach of contract committed by the respondents that he could not take delivery of the firewood sold in his favour. Thus this is not a case where breach of contract has been admitted by the petitioner. The question in such a case is whether the department is entitled to unilaterally quantify the damages alleged to have been sustained by them and recover the same. This question has come up before this court on various decisions and a Full

Bench in the case of **Abdul Rahiman v. Divisional Forest Officer (1988(2) KLT 290)** considered this issue. After analysing the precedents, the Full Bench has held that adjudication regarding the breach of contract has to be left to an independent person or body and cannot be done by one of the parties to the contract. In this case, by Ext.P6, the respondents have taken upon themselves the right to adjudicate the breach of the contract and also the quantification of the damages. This is impermissible. Once breach of contract is admitted by a party to the contract, if the contract enables the other party to quantify the damages sustained by it on account of the breach, the other party is entitled to quantify the same. But that principle is inapplicable to the facts of this case, in as much as the breach is not admitted by the petitioner. Therefore, the respondents cannot take any coercive action against the petitioner pursuant to Ext.P6. If they want to realise the

damages alleged to have been sustained by them, they have to take recourse to Civil Court. Therefore, I hold that the respondents are not entitled to take any coercive action for recovery against the petitioner, on the strength of Ext.P6.

7. It is the admitted case that the petitioner had deposited an amount of Rs.20,000/- with the respondents. Even as on date, since the question whether the petitioner has committed breach of contract has not been adjudicated in the manner known to law, respondents are not justified in withholding the amount. They are liable to refund the said amount, which they shall do within a period of two months from the date of receipt of a copy of this judgment. In the peculiar facts of this case, I am not making them liable for interest thereof. If the respondents file a suit at this distance of time, certainly a question of limitation is likely to be pleaded, in which case, they will be entitled to claim the

benefit for the period during which this original petition was pending before this Court. However, I am not finally pronouncing on this aspect, as it will be open to the respondents to claim the benefit, in which case, the Court will take this also into account and pass appropriate orders thereon.

8. In the result, the original petition will stand disposed of with a declaration that the respondents are not entitled to take any coercive action for the recovery of the alleged loss on the strength of Ext.P6. They shall refund an amount of Rs.20,000/- deposited by the petitioner within a period of two months from the date of receipt of a copy of this judgment.

Writ petition is disposed of as above.

ANTONY DOMINIC, JUDGE.

Rp